

APPEAL NO. 160079  
FILED MARCH 10, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). An expedited contested case hearing (CCH) was held on December 7, 2015, in Abilene, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues before him by deciding that: (1) the compensable injury of (date of injury), extended to a right shoulder dislocation with labral tear after September 26, 2014; (2) the first certification of maximum medical improvement (MMI) and assignment of impairment rating (IR) from (Dr. W) on October 1, 2014, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the respondent (claimant) reached MMI on August 19, 2015; and (4) the IR is zero percent.

The appellant (carrier) appeals the hearing officer's determinations concerning extent of the compensable injury as well as MMI/IR and finality as contrary to the great weight of the evidence and argues that, rather than a previously undiagnosed condition, the claimant sustained a new intervening injury after September 26, 2014. The claimant responds, urging affirmance.

**DECISION**

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury).

**EXTENT OF INJURY**

The hearing officer's determination that the compensable injury of (date of injury), extends to a right shoulder dislocation with labral tear after September 26, 2014, is supported by sufficient evidence and is affirmed.

**FINALITY**

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period

begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both.

Section 408.123 provides in part:

(f) An employee's first certification of [MMI] or assignment of an [IR] may be disputed after the period described by Subsection (e) if:

(1) compelling medical evidence exists of:

(A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR];

(B) a clearly mistaken diagnosis or a previously undiagnosed medical condition; or

(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

The claimant testified that, while working on an oil rig on the date of injury, he sustained a dislocation of his right shoulder resulting in a labral tear. On February 20, 2014, the claimant underwent arthroscopic repair of a right shoulder anterior labral Bankart tear secondary to dislocation. Following post-surgical treatment, Dr. W, the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division), examined the claimant on October 1, 2014, and certified that the claimant reached MMI on that date, with a four percent IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000). It is not disputed that Dr. W's is the first valid certification of MMI and assignment of IR or that the claimant received a copy of Dr. W's certification on October 17, 2014, and did not dispute the same within 90 days of receiving it through verifiable means.

Thereafter, on December 12, 2014, the claimant returned to his surgeon, (Dr. B), with complaints of recurrent right shoulder pain. The claimant underwent a second surgical procedure on May 19, 2015, a right shoulder arthroscopy with revision of anterior labral repair. In his operative report, Dr. B stated that the "more superior portion [of the anterior labrum] had not healed and he had a recurrent tear." On November 2, 2015, the claimant was examined by (Dr. E), a referral of the treating

doctor, who certified that the claimant reached MMI on August 19, 2015, and who assigned an IR of zero percent.

At the CCH the claimant argued that he met the exceptions under Section 408.123(f)(1)(B), a clearly mistaken diagnosis or previously undiagnosed medical condition, or Section 408.123(f)(1)(C), improper or inadequate treatment of the injury before the date of Dr. W's certification and assignment.

On September 26, 2014, the claimant's surgeon, having reviewed recent MRI test results, opined that there were no loose anchors or new labral tears and that the claimant should "[p]roceed with MMI as scheduled." In this case, the hearing officer determined that the surgically repaired labral tear had not healed by the date of Dr. W's October 1, 2014, certification of MMI/IR and stated in his findings of fact that:

4. The right shoulder dislocation and labral tear that existed after September 26, 2014, was a non-healing surgically repaired labral tear that represented an undiagnosed condition that arose out of or naturally flowed from the (date of injury), compensable injury and surgery the for that injury.

We disagree that the claimant's non-healing surgically repaired labral tear constituted an undiagnosed medical condition meeting the exception under Section 408.123(f)(1)(B).

An exception to finality requires compelling medical evidence. Review of the record reflects that the possibility that the claimant had suffered a labral tear after his right shoulder dislocation was noted in medical records as early as the date of injury, (date of injury); was confirmed by Dr. B on February 5, 2014; was treated surgically by Dr. B on February 20, 2014, and again on May 19, 2015; and is the condition rated by the designated doctor on October 1, 2014. In the absence of a timely dispute, the claimant's first certification of MMI and assignment of IR became final because the repeat surgery performed on May 19, 2015, was treatment for a condition that was essentially a continuation of the original medical condition for which MMI had been certified and an IR assigned. The claimant's non-healed surgically repaired labral tear does not constitute compelling medical evidence of a clearly mistaken diagnosis or a previously undiagnosed medical condition under Section 408.123(f)(1)(B).

Although the hearing officer made no findings regarding the claimant's argument at the CCH that he had received improper or inadequate treatment, we note there is no compelling medical evidence in the record that the claimant's treatment prior to the date

of Dr. W's certification of MMI/IR was inadequate or that the surgical procedure on February 20, 2014, was improperly performed which would render the certification and assignment invalid under Section 408.123(f)(1)(C).

The hearing officer's decision that the first certification of MMI and assigned IR from Dr. W did not become final under Section 408.123 is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust because compelling medical evidence does not exist of either a clearly mistaken diagnosis or previously undiagnosed medical condition under the exception to finality in Section 408.123(f)(1)(B) or of improper or inadequate treatment before the date of the certification or assignment that would render the certification or assignment invalid under the exception to finality in Section 408.123(f)(1)(C). Accordingly, we reverse the hearing officer's determination that Dr. W's certification of MMI and IR did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR from Dr. W on October 1, 2014, became final under Section 408.123 and Rule 130.12.

#### **MMI/IR**

Because we find that the first certification of MMI and assignment of IR from Dr. W became final under Section 408.123 and Rule 130.12, we also reverse the hearing officer's determination that the claimant reached MMI on August 19, 2015, with an IR of zero percent as certified by Dr. E and render a new decision that the claimant reached MMI on October 1, 2014, with an IR of four percent as certified by Dr. W.

#### **SUMMARY**

We affirm the hearing officer's determination that the compensable injury of (date of injury), extends to a right shoulder dislocation with labral tear after September 26, 2014.

We reverse the hearing officer's determination that Dr. W's certification of MMI and IR did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR from Dr. W on October 1, 2014, became final under Section 408.123 and Rule 130.12.

We reverse the hearing officer's determination that the claimant reached MMI on August 19, 2015, and that the IR is zero percent and we render a new decision that the claimant reached MMI on October 1, 2014, and that the IR is four percent as certified by Dr. W.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TX 78701**

K. Eugene Kraft  
Appeals Judge

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CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge